IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1976

NO. 75-6852

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SUPREME COURT, U.S.

CHARLES IRA BURKE,

Petitioner,

-vs-

STATE OF NORTH CAROLINA,

Respondent.

. . . . . .

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

. . . . . .

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-vs-

STATE OF NORTH CAROLINA,

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* * * * * * * * * * * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

* * * * * * * * * * * * * * * * * * * *

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the North Carolina Court of Appeals entered in this proceeding on February 4, 1976.

OPINION BELOW

The opinion of the Court of Appeals of North Carolina is reported at 28 N.C. App. 469, 221 S.E.2d 713(1976). An Order Denying Petition for Writ of Certiorari to the North Carolina Court of Appeals was entered on April 5, 1976, by the Supreme Court of North Carolina and is reported at 289 N.C. 616, 223 S.E.2d 390 (1976). A copy of said Opinion and Order appears in the Appendix hereto as Exhibits 1 and 2.

QUESTION PRESENTED

Is the decision of the Supreme Court of the United States in Mullaney v. Wilber, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508(1975) retroactive in effect?

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3). This Petition for Certiorari was filed within 90 days of an Order by the highest court of North Carolina in which a decision could be had.

CONSTITUTIONAL PROVISION INVOLVED

The "Due Process" clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF CASE

This was a criminal action tried on a Bill of Indictment charging Charles Ira Burke with the first degree murder of one Lawrence Jerry Stone, the "head bouncer" of a "topless bar" in the City of Fayetteville, North Carolina. After conclusion of the evidence and arguments of counsel the Court instructed the jury on two occasions that in order to reduce the crime from second degree murder to voluntary manslaughter the defendant must prove to their satisfaction that he killed the deceased in the heat of passion brought upon by sudden provocation which the law regards as legally sufficient provocation. The Court further instructed the jury that it could find the defendant not guilty on the grounds of self-defense if the defendant proved to the satisfaction of the jury (a) that he believed it necessary to kill the deceased in order to save himself from death or great bodily harm; (b) that the circumstances, as they appeared to the defendant at the time, were sufficient to create such a belief in a person of ordinary firmness; and (c) that the defendant was not an aggressor in the fight.

Approximately three and one half hours after retiring to deliberate the jury again returned into the courtroom and requested reinstruction on the difference between second degree murder and voluntary manslaughter. There, for a third time, the Court instructed that in order to reduce the crime from second degree murder to voluntary manslaughter the burden was upon the defendant to prove the above-mentioned facts to the satisfaction of the jury.

Petitioner was subsequently convicted of second degree murder upon his plea of not guilty. He was sentenced to a term of 32 to 40 years imprisonment on the 27th day of November, 1974.

In an Opinion filed on February 4, 1976 and reported at 28 N.C. App. 469, 221 S.Ed.2d 713(1976), the North Carolina Court of Appeals affirmed the petitioner's conviction even though they found that the instructions given in the case violated the principals of the Mullaney decision on the ground that Mullaney should not be given retroactive effect in North Carolina. See State v. Hankerson, 228 N.C. 632, 220 S.Ed.2d 575(1975).

The North Carolina Supreme Court denied the Petition for Certiorari. 289 N.C. 616, 223 S.Ed.2d 390(1976).

REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT BETWEEN THE DECISION OF THE NORTH CAROLINA

COURT OF APPEALS AND THE RECENT DECISIONS OF THE UNITED STATES SUPREME COURT.

Mullaney v. Wilber, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508(1975), held that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. Said decision did not proclaim a new principal of law; rather, petitioner contends that Mullaney simply expanded upon the principal laid down by the Court in the previous decision of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368(1970); to-wit, that the prosecution in a criminal trial must prove each element beyond a reasonable doubt. This principal was held to be fully retroactive prior to the Mullaney decision. See Ivan v. City of New York, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659(1972).

Yet in its Hankerson decision, Supra, relied upon by the North Carolina Supreme Court in affirming petitioner's conviction, the North Carolina Supreme Court held Mullaney not to be retroactive.

In deciding whether a rule of constitutional proportions will be given retroactive effect the most important concern is whether the rule is designed to protect the reliability of the fact finding process. Ivan v. City of New York, Supra, Roberts v. Russell, 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100(1968). In the present case the defendant was convicted of second degree murder and was sentenced to 32 to 40 years imprisonment. Under North Carolina General Statute 14-17, the petitioner could have received a sentence up to and including life imprisonment. Had he been convicted of voluntary manslaughter, he could have received a maximum sentence of 20 years imprisonment under North Carolina General Statute 14-18. Had the petitioner been acquitted on the grounds of self-defense, he would have, of course, gone free.

At the time of petitioner's trial, North Carolina law required a defendant to prove certain facts to the satisfaction of the jury in order to mitigate the degree of the offense or to excuse him from it altogether. In petitioner's case and in Hankerson, it was held that this was error under Mullaney.

Yet, it has been held that petitioner is not entitled to a new trial because such a requirement would have a substantial effect on the

administration of the criminal justice system. 220 S.Ed.2d 575 at 590. Therefore, it is reasoned, the interest of the petitioner must be subverted to the interest of orderly administration of justice even if he was convicted on evidence that indicated it was as likely as not that he deserves a significantly lesser sentence or deserves to be acquitted altogether.

"This is an intolerable result in a society where...it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." 95 S.Ct. 1881 at 1892.

Petitioner says and contends that the decision of the North Carolina Court of Appeals is clearly erroneous and in conflict with the Mullaney, Winship and Ivan decisions.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF AT LEAST ONE OTHER STATE COURT OF APPEALS AS TO THE PROPER APPLICATION OF MULLANEY AND THUS THERE IS A SPLIT OF AUTHORITY AMONG THE STATES.

As discussed above, in Hankerson, Supra, the Supreme Court of North Carolina declined to give Mullaney retroactive effect. Upon that authority, the Court of Appeals of North Carolina affirmed petitioner's conviction.

In Evans v. State, 18 Cr.L. 2353, the Maryland Court of Special Appeals in a case similar to petitioners ruled Mullaney to be a simple application of the Winship rule to a murder conviction and thus ruled that Mullaney was fully retroactive.

Petitioner says and contends that this conflict justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the North Carolina Court of Appeals.

RESPECTFULLY SUBMITTED.

NEILL FLEISHMAN

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EXHIBIT "1"

NO. 7512SC615

NORTH CAROLINA COURT OF APPEALS

Filed: 4 February 1976

STATE OF NORTH CAROLINA

v.

CHARLES IRA BURKE

Cumberland County
No. 74CR14097

Appeal by defendant from Long, Judge. Judgment entered 11 November 1974 in Superior Court, Cumberland County. Heard in the Court of Appeals 24 October 1975.

Defendant pled not guilty to an indictment charging him with the first degree murder of Lawrence Jerry Stone. The jury returned a verdict of guilty of second degree murder.

Evidence presented at the trial tended to establish that on the evening of 1 May 1974 the defendant, along with his father, Charles Burke, and Richard Lynn Marshall, visited a topless bar in the City of Fayetteville. They were all intoxicated.

Defendant and his party became unruly and they were approached by Jerry Stone, assistant manager of the bar, and two "bouncers." After some discussion defendant refused to leave voluntarily and a "free for all" fight started. Defendant finally pulled a handgun and forced his adversary to back off. Marshall and Stone fought their way out through the back door. Defendant followed them out the door, and Marshall and defendant were both seen in the parking lot beating Stone. Stone was shot to death.

Defendant was given an active sentence and he appealed to this Court.

Attorney General Edmisten, by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Zoro J. Guice, Jr., for the State.

H. Gerald Beaver, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

ARNOLD, Judge.

Defendant's argument that the trial judge erred in denying his motion to consolidate for trial the cases of State v. Charles Ira Burke and State v. Richard Lynn Marshall is rejected. It is within the discretion of the trial court to consolidate for trial homicide cases against two defendants where both defendants are indicted for an offense of the same class arising out of the same killing. State v. Bass, 280 N.C. 435, 186 S.E. 2d 384 (1972); State v. Feimster, 21 N.C. App. 602, 205 S.E. 2d 602 (1974); G.S. 15-152 (Repealed effective 1 September 1975). The exercise of that discretion will not be disturbed absent a showing of abuse. State v. Feimster, supra. Defendant's case was not prejudiced by the trial judge's denial of defendant's motion to consolidate the cases for trial. The trial judge did not abuse his discretion in denying defendant's motion.

Defendant next contends that the trial court erred in denying his motion that the case of State v. Richard Lynn Marshall be called for trial prior to the defendant's case. Defendant's motion was made to the trial court in chambers on the day that defendant's case was called for trial. We cannot say that the trial judge abused his discretion in denying the defendant's motion for a continuance. State v. Stepney, 280 N.C. 306, 185 S.E. 2d 844 (1972); State v. Morrison, 19 N.C. App. 717, 200 S.E. 2d 341 (1973).

Finally, arguing Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. ___, 44 L.Ed. 2d 508 (1975), defendant assigns error to the trial court's instructions to the jury that the defendant must prove, not beyond a reasonable doubt but only to the jury's satisfaction, that he killed in the heat of passion or sudden provocation in order to reduce second degree murder to manslaughter. The assignment has no merit.

The North Carolina Supreme Court has recently held that "by reason of the decision in Mullaney the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in Mullaney. We decline, however, for reasons hereinafter stated, to give Mullaney retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the Mullaney decision, the defendant is not entitled to the benefit of the Mullaney doctrine. We will however apply the decision to all trials conducted on or after June 9, 1975." State v. Hankerson, ___ N.C. ___, ___ S.E. 2d ___ (Filed 17 December 1975).

Since the trial in this case against defendant was concluded prior to 9 June 1975 the Mullaney holding does not apply. State v. Hankerson, supra.

Defendant's remaining assignments of error have been reviewed and are found to have no merit.

No error.

Judges BRITT and VAUGHN concur.

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OF NORTH CAROLINA
BY Ruth Hart
DEPUTY CLERK
May 19, 19 76

EXHIBIT "2"

NO. 87PC TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1976

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STATE OF NORTH CAROLINA	)	ORDER DENYING PETITION FOR DISCRETIONARY REVIEW
v	)	
CHARLES IRA BURKE	)	(7512SC615)

****

This cause came on to be considered upon the petition of the defendant for discretionary review under G.S. 7A-31 to the North Carolina Court of Appeals; upon consideration whereof, it is adjudged by the Court here, that the petition be denied and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

Witness my hand and the seal of the Supreme Court, this 5th day of April, 1976.

Adrian J. Newton
Clerk of the Supreme Court of
North Carolina

By:

s/ John R. Morgan
Assistant Clerk

cc: H. Gerald Beaver, Attorney at Law
R. Bruce White, Jr., Senior Deputy Attorney General
Zoro J. Guice, Jr., Assistant Attorney General
Edward W. Grannis, Jr., District Attorney

A TRUE COPY
ADRIAN J. NEWTON
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
BY Mrs. Peggy N. Boyd
DEPUTY CLERK
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Spring Term, 1976

No. 75-6852

CHARLES IRA BURKE,

Petitioner,

vs

STATE OF NORTH CAROLINA,

Respondent

Resp of State of NC

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

No. 75-6852

CHARLES IRA BURKE,

Petitioner,

vs

STATE OF NORTH CAROLINA,

Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

TO: THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes RUFUS EDMISTEN, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA, and for his Answer to the Petition for Writ of Certiorari to the United States Supreme Court filed by the petitioner in the above entitled cause says:

1. That the decision by the North Carolina Court of Appeals was unanimous and that the decision of the North Carolina Supreme Court denying the petitioner's appeal and Petition for Writ of Certiorari to that Court was unanimous.

2. That the Petition for Writ of Certiorari to this Court should be denied in that the decision of the North Carolina Court of Appeals and of the North Carolina Supreme Court were not in conflict with any of the decisions of the North Carolina Supreme Court or of the Supreme Court of the United States.

3. That the decisions of the North Carolina Appellate Courts did not result in the denial to the Petitioner of any of his rights guaranteed to him by the laws and Constitution of the State of North Carolina and by the Constitution of the United States.

4. In the Answer to the Petitioner's substantive allegations of error, the State of North Carolina says that the Petitioner has failed to show good or just cause for further review and that no such cause exists; that the entire record in this case does not reveal that any of the rights secured to the Petitioner by North Carolina law, the North Carolina Constitution or the United States Constitution were violated; and, there is, therefore, no substantial question arising under the Constitution of the State of North Carolina or the Constitution of the United States. There was sufficient evidence to convict the defendant of the crime with which he stood indicted.

5. The State of North Carolina specifically includes as a part of this response the decision of The North Carolina Court of Appeals and the Order by the North Carolina Supreme Court denying Petition for Discretionary Review (both attached to Petitioner's Petition) and in addition the Brief of Respondent, State of North Carolina, previously filed with the Supreme Court of the United States, October Term, 1975, No. 75-6568 in opposition to Petition for Writ of Certiorari, in the matter of Johnnie B. Hankerson, Petitioner vs The State of North Carolina, Respondent. All of these are incorporated herein and made a part hereof by reference.

This the 7th day of September, 1976.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

R. BRUCE WHITE, JR.
Deputy Attorney General

Guy A. Hamlin
Assistant Attorney General